

1 David L. Sobel (*pro hac vice pending*)  
 2 *sobel@eff.org*  
 3 ELECTRONIC FRONTIER FOUNDATION  
 4 1875 Connecticut Ave. NW  
 5 Suite 650  
 6 Washington, DC 20009  
 7 Telephone: (202) 797-9009 x104  
 8 Facsimile: (202) 707-9066

9  
 10 Kurt Opsahl (SBN 191303)  
 11 *kurt@eff.org*  
 12 Marcia Hofmann (SBN 250087)  
 13 *marcia@eff.org*  
 14 ELECTRONIC FRONTIER FOUNDATION  
 15 454 Shotwell Street  
 16 San Francisco, CA 94110  
 17 Telephone: (415) 436-9333 x116  
 18 Facsimile: (415) 436-9993

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 20 Attorneys for Plaintiff  
 21 ELECTRONIC FRONTIER FOUNDATION

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 28 **UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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 30 ELECTRONIC FRONTIER FOUNDATION, ) NO. C 07-5278 EMC  
 31 Plaintiff, )  
 32 v. ) **MEMORANDUM OF POINTS AND**  
 33 ) **AUTHORITIES IN SUPPORT OF**  
 34 ) **APPLICATION FOR ORDER**  
 35 ) **SHORTENING TIME FOR**  
 36 ) **PRELIMINARY INJUNCTION**  
 37 ) **HEARING**  
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1 time. Further, the requested schedule will not pose a hardship to Defendant Office of the Director  
 2 of National Intelligence (“ODNI”), and may result in the public release of documents relevant to an  
 3 important matter of public concern currently being debated in Congress.

4 **I. THE COURT HAS AUTHORITY TO SHORTEN TIME TO HEAR A MOTION FOR  
 5 PRELIMINARY INJUNCTION**

6 Rule 6(d) of the Federal Rules of Civil Procedure explicitly fixes the time for hearings on  
 7 noticed motions “unless a different period is fixed . . . by order of the court.” Fed. R. Civ. P. 6(d).  
 8 That same rule authorizes a party to seek a different time period upon an *ex parte* application. *Id.*  
 9 The Court, pursuant to Rule 6(d), may shorten the time for hearing a motion. *E.g., United States v.*  
 10 *Fitch*, 472 F.2d 548, 549 n. 5 (9th Cir. 1973), *cert. denied*, 410 U.S. 914 (1973) (shortened time  
 11 regarding civil contempt of grand jury witnesses). Thus, this Court has the authority to shorten the  
 12 time for a hearing on EFF’s concurrently filed Motion for Preliminary Injunction.

13 **II. SHORTENED TIME IS APPROPRIATE UNDER THESE CIRCUMSTANCES**

14 This lawsuit seeks to compel ODNI to process the requested records expeditiously under  
 15 the FOIA because they involve a matter about which there is an “urgency to inform the public  
 16 about actual or alleged Federal Government activity,” and they are sought by “a person primarily  
 17 engaged in disseminating information.” ODNI has conceded that EFF’s FOIA requests satisfy this  
 18 statutory standard, and are legally entitled to expedited processing. Notwithstanding ODNI’s  
 19 purported decision to expedite the processing of EFF’s FOIA requests, however, the agency has to  
 20 date neither completed the processing of EFF’s requests, nor informed EFF of an anticipated date  
 21 for the completion of the processing of the requests.

22 A hearing before this Court on shortened time is necessary because two pieces of legislation  
 23 recently introduced in Congress may imminently amend the Foreign Intelligence Surveillance Act:  
 24 the RESTORE Act of 2007, H.R. 3773, and the Foreign Intelligence Surveillance Act of 1978  
 25 Amendments Act of 2007, S. 2248. The Senate bill, which was introduced and approved on  
 26 October 18, 2007 by the Senate Select Committee on Intelligence, purports to require dismissal of  
 27 any state or federal lawsuit against a carrier for facilitation of government surveillance if the  
 28 Attorney General certifies to the court that the company was assisting in certain intelligence

1 activity authorized by the President. Senate Majority Leader Harry Reid has publicly indicated that  
2 he expects the bill to reach the Senate floor by mid-November. This vote may be delayed for various  
3 reasons. Still, because these two new proposals aim to replace a stopgap measure that will expire  
4 in February of 2008, we anticipate Congress will decide on the proposed legislation, including the  
5 immunity provision, extremely soon.

6 A hearing on shortened time is necessary also because EFF's repeated efforts to negotiate a  
7 production schedule with ODNI have been unsuccessful. On October 22, 2007, EFF attorney  
8 Marcia Hofmann phoned Andrew I. Warden, Trial Attorney at the Department of Justice, and  
9 informed him that EFF had filed the complaint in this matter on October 17, 2007. Mr. Warden is  
10 counsel in a similar but unrelated lawsuit between EFF and the Department of Justice currently  
11 pending in the District Court for the District of Columbia, *Electronic Frontier Foundation v. Dep't*  
12 *of Justice*, No. 07-1732 (D.D.C. filed Sept. 27, 2007). Mr. Warden told Ms. Hofmann that he  
13 anticipated that he would be counsel for Defendant in this action and had obtained a copy of the  
14 October 17, 2007 complaint.

15 During this conversation, Ms. Hofmann told Mr. Warden that EFF wanted to explore the  
16 possibility of negotiating a processing schedule for EFF's FOIA requests to eliminate the need for  
17 further action in this case. She explained, however, that legislation had been introduced and  
18 approved on October 18, 2007 in the Senate Select Committee on Intelligence that is closely  
19 related to the subject matter of the records underlying this case. Ms. Hofmann told Mr. Warden  
20 that this development has significantly increased the urgency for the public to obtain the records  
21 sought from ODNI, and that EFF would consider seeking preliminary injunctive relief in the  
22 absence of an agreement to process EFF's requests in a timely manner. Mr. Warden told Ms.  
23 Hofmann he would consult with his client.

24 On October 26, 2007, Ms. Hofmann conferred with Mr. Warden by phone and informed  
25 him of EFF's intention to move for a preliminary injunction and to seek an order to request  
26 shortened time for a hearing on the motion if EFF and ODNI had not reached an agreement by  
27 Monday, October 29, 2007. As of this filing, no documents have been produced, and Mr. Warden  
28

1 has not indicated when EFF's requests will be processed.

2 **III. CONCLUSION**

3 Accordingly, Plaintiff respectfully askS that the Court shorten the time for hearing on EFF's  
4 Motion for Preliminary Injunction to November 20, 2007 or the next available date.

5 By /s/  
6 David L. Sobel (*pro hac vice pending*)  
7 ELECTRONIC FRONTIER FOUNDATION  
8 1875 Connecticut Ave. NW  
9 Suite 650  
Washington, DC 20009  
Telephone: (202) 797-9009 x104  
Facsimile: (202) 707-9066

10 Kurt Opsahl, Esq.  
11 Marcia Hofmann, Esq.  
12 ELECTRONIC FRONTIER FOUNDATION  
13 454 Shotwell Street  
San Francisco, CA 94110  
Telephone: (415) 436-9333  
Facsimile: (415) 436-9993

14 Attorneys for Plaintiff  
15 ELECTRONIC FRONTIER FOUNDATION

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 29, 2007, I electronically filed the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR ORDER SHORTENING TIME FOR PRELIMINARY INJUNCTION HEARING with the Clerk of the Court using the CM/ECF system which will send e-mail notification of such filing, and I hereby certify that I will mail the foregoing document or paper on October 29, 2007, via express delivery service for guaranteed delivery on the next business day to the following non-CM/ECF participant:

Andrew I. Warden  
Trial Attorney  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
20 Massachusetts Ave., NW, Room 6120  
Washington, DC 20530

By \_\_\_\_\_ /s/  
Marcia Hofmann (SBN 250087)  
ELECTRONIC FRONTIER FOUNDATION  
454 Shotwell Street  
San Francisco, CA 94110  
Telephone: (415) 436-9333 x116  
Facsimile: (415) 436-9993  
marcia@eff.org